Re Lim Kim Guan, ex p Four Seas Bank Ltd

HIGH COURT (SINGAPORE) — BANKRUPTCY NOS 3713 OF 1989 AND 3714 OF 1989
THEAN J
21 OCTOBER 1990

Bankruptcy — Bankruptcy notice — Whether invalid in that the judgment pursuant to which demand was stated to be made was not a final judgment — Whether bankruptcy notice failed to require payment of the judgment sum in accordance with the terms of the judgment — Whether errors in the calculation of interest which resulted in an understatement of the interest demanded in the bankruptcy notice rendered such notice bad — Bankruptcy Act (Cap 20, 1985 Ed), ss 3(1)(i) & 133 — Rules of the Supreme Court 1970, O 42 r 12

On 5 December 1989 the petitioners took out two bankruptcy notices against the two debtors and the bankruptcy notices were served on the two debtors. Each of the debtors failed to comply with the requirements of the respective bankruptcy notices and following that, the petitioners on 9 January 1990 presented the two bankruptcy petitions against them respectively; each bankruptcy petition founded on the failure by the debtor concerned to comply with requirements of the bankruptcy notice served on him or her, as the case may be.

The two debtors contested the bankruptcy petitions, contending that the bankruptcy notice in each case was invalid and accordingly that each of them had not committed an act of bankruptcy. Counsel for the debtors challenged the validity of each of the two bankruptcy notices on the following three grounds:

(i) the bankruptcy notice purported to demand payment of a sum due on a judgment which was not a final judgment within the meaning of s 3(1)(i) of the Bankruptcy Act (Cap 20, 1985 Ed) because there was no judicial determination or ascertainment of the petitioner's prime lending rate;
(ii) the bankruptcy notice failed to require payment of the interest on the judgment sum in accordance with the terms of the judgment; and
(iii) there were errors in the calculation of interest the net result of which was that there was an understatement of the interest demanded in the bankruptcy notice; moreover, interest should be calculated not to the date of the issue of the bankruptcy notice as stated in the bankruptcy notice but to the date of payment. Whilst a sum less than the amount due under a judgment may be claimed in a bankruptcy notice, in such a case, however, the notice must state clearly that nothing more is claimed to be due on the judgment beyond the amount demanded in the notice.

Held, dismissing the debtors' grounds of objection:

(1) As regards the debtors' first ground of objection, the test relied upon by the debtors' counsel was not the proper test, which test should be whether the judgment or order as made finally disposes of the rights of the parties. If it does, then it ought to be treated as a final order; but if it does not, it is then an interlocutory order. The judgment in this case finally disposed of the rights of the parties in the action. There was no reason why the judgment could not incorporate therein the petitioners' 'prime lending rate' as a base for determining the rate of interest the debtors are required to pay; that was part of the judgment and gave effect to the contractual rate of interest applicable for the period preceding the date of the judgment. The judgment did not contemplate any further judicial determination or ascertainment of the petitioners' prime lending rate and no such judicial determination was required. Hence, the judgment obtained by the petitioners against the debtors was a final judgment.

(2) The judgment specifically stated the petitioners' prime lending rate as a base for determining the rate of interest payable and that prime lending rate (determined by the petitioners) was set out in the bankruptcy notice. The rate of interest and the formula for calculation of interest were clearly set out in the bankruptcy notice and it could not be said that because of the minor discrepancies the bankruptcy notice was calculated to mislead embarrass or perplex the debtors.

(3) Where a creditor makes an over-demand in a bankruptcy notice, he is claiming what is never due to him. In the case of an under-demand or understatement of a judgment debt, every cent that is demanded in the bankruptcy notice is due to the creditor and the only question is whether such under-demand or understatement of the judgment debt is capable of misleading, embarrassing or perplexing the debtor concerned; if it does not s 133 of the Bankruptcy Act (Cap 20, 1985 Ed) operates to validate the bankruptcy notice.

[*Editorial Note*: The debtors have appealed to the Court of Appeal vide Civil Appeal Nos 112 and 113 of 1990.]

Cases referred to

1 *Re Lim Kim Guan, ex p Four Seas Communications Bank Ltd* [1990] 1 MLJ 261 (refd)
2 *Bozson* v *Altrincham Urban District Council* [1903] 1 KB 547 (folld)
3 *Haron bin Mohammed Said* v *Central Securities (Holdings) Bhd* [1983] 1 AC 16 (folld)
4 *Re HB* [1904] 1 KB 94 (distd)
5 *Re Farrugia, ex p Deputy Commissioner of Taxation* (1988) 80 ALR 651 (folld)
6 *Kleinwort Benson Australia Ltd* v *Crowl* (1988) 79 ALR 161 (folld)
7 *N Rengasamy Pillai* v *Comptroller of Income Tax* [1970] AC 1124 (folld)
8 *Re A Debtor* [1908] 2 KB 684 (refd)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) ss 3(1)(i), 133
Rules of the Supreme Court 1970 O 42 r 12

Rajah Chelva Retnam (*Timothy Koh* with him) for the petitioners.
Warren Khoo (*Tan May Jee (Ms)* with him) for the debtors.

Cur Adv Vult

Thean J: These two bankruptcy petitions before me are a sequel to my decision in *Re Lim Kim Guan, ex p Four Seas Communications Bank Ltd.*[1] Arising from my decision in that case, the petitioners initiated fresh bankruptcy proceedings against the two debtors, Lim Kim Guan and Ng Sew Eng ('the debtors'). On 5 December 1989, the petitioners took out two bankruptcy notices against them and the bankruptcy notices were served on them respectively. They each failed to comply with the requirements of the respective bankruptcy notices, and following that, the petitioners on 19 January 1990 presented these two bankruptcy petitions against them

respectively; each bankruptcy petition is founded on the failure by the debtor concerned to comply with requirements of the bankruptcy notice served on him or her, as the case may be.

The debtors once again contest the bankruptcy petitions, contending that the bankruptcy notice in each case is invalid and, accordingly, each of them has not committed an act of bankruptcy. The contents of the two bankruptcy notices are identical (with necessary modifications only as to the names of the parties); so also are the bankruptcy petitions. For my purpose it is sufficient to refer to and consider only the content of one bankruptcy notice, as my decision thereon equally applies to the other.

Before I consider the grounds on which counsel for the debtors challenges the validity of the bankruptcy notice, it is convenient at this stage to set out the substantive part of the bankruptcy notice, which is as follows:

> Take Notice that within seven (7) days after service of this notice on you, excluding the day of such service, you must pay to Four Seas Bank Limited of 19-25, Cecil Street, Singapore 0104, the sum of $207,456.00 made up as follows:
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> | | | |
> |---|---|---|
> | Amount owing as at 1 June 1988 | | $201,479.41 |
> | Plus: Interest at 9.5% pa (ie interest at 3.75% above the creditors prime rate of 5.75% pa) with monthly rests on the last day of each calendar month from 1 June 1988 to 5 July 1988 | $ 1,784.90 | |
> | | | $203,264.31 |
> | Less: Part payment on 5 July 1988 | $ 500.00 | |
> | | | $202,764.31 |
> | Plus: Interest at prime of 5.75% pa plus 3.75% with monthly rests as above from 6 July 1988 to 30 September 1988 | $ 3,991.69 | |
> | Amount owing as at 30 September 1988 | | $206,756.00 |
> | Costs awarded in Suit No 1262 of 1988 | $ 700.00 | |
> | | | $207,456.00 |
>
> plus interest thereon from 1 October 1988 till date of this bankruptcy notice at 8% pa which interest amounts to $45.46 per day claimed by them as being the amount due on the judgment dated 30 September 1988 obtained by them against you in the High Court of the Republic of Singapore in Suit No 1262 of 1988 whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of this court, or you must satisfy this court that you have a counterclaim, set-off or cross-demand against the said Four Seas Bank Limited which equals or exceeds the said sum claimed by them and which you could not set up in the action in which the judgment was obtained.

There are mainly three grounds on which counsel for the debtors contends that the bankruptcy notice is invalid. The first ground is that the bankruptcy notice purported to demand payment of the sum of $207,456 due on a judgment dated 30 September 1988, and that judgment is not a final judgment within the meaning of s 3(1)(i) of the Bankruptcy Act (Cap 20, 1985 Ed) because there has been no judicial determination or ascertainment of the plaintiffs' prime lending rate. In view of this challenge on the finality of the judgment, it is necessary once again to re-examine the judgment, the material part of which is as follows:

> It is this day adjudged that the second and third defendants (Lim Kim Guan and Ng Sew Eng) do pay the plaintiffs the sum of $201,479.41 plus interest thereon from 1 June 1988 to date of judgment at the rate of 3.5% pa above the plaintiffs' prime lending rate of the basis of a 365-day year with monthly rests and $700 costs.

The judgment by its terms 'adjudged' that the debtors do pay the petitioners a definite sum with interest and costs; and there is nothing on the face of it to show that it is otherwise than a final judgment. Counsel for the debtors, however, contends that the judgment leaves undetermined the exact rate of interest chargeable on the principal sum so that the total amount due on the judgment cannot be calculated without reference to extrinsic sources, and a judgment, in his submission, is not final, unless it orders the payment of a sum fixed and liquidated on the face of it without recourse to any extrinsic source. Counsel, however, has not cited any authority in support of this test of a final judgment. I disagree with him entirely. The test of which counsel relies is not the proper test of a final judgment. In *Bozson* v *Altrincham Urban District Council*,[2] the question arose as to what was a final judgment. Lord Alverstone CJ in his judgment said:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.

That test has been accepted by the Privy Council in *Haron bin Mohammed Said* v *Central Securities (Holdings) Bhd.*[3] I respectfully accept that as a proper test of a final judgment. There is no doubt in my mind that this judgment finally disposed of the rights of the parties in the action. There is no reason why the judgment cannot incorporate therein the 'plaintiffs' prime lending rate' as a base for determining the rate of interest the debtors are required to pay; that is part of the judgment and gives effect to the contractual rate of interest applicable for the period preceding the date of the judgment. I do not see how, on the test laid down in *Bozson*,[2] this part of the judgment can really affect the finality of the judgment. The judgment does not contemplate any further judicial determination or ascertainment of the

plaintiffs' prime lending rate, and no such judicial determination or ascertainment is required. In my opinion, the judgment obtained by the petitioners against the debtors is a final judgment.

The second ground advanced by counsel for the debtors is that the bankruptcy notice fails to require payment of the judgment sum in accordance with the terms of the judgment as provided in s 3(1)(i) of the Bankruptcy Act. Section 3(1)(i) provides as follows:

> A debtor commits an act of bankruptcy in each of the following cases:
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> ...
>
> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Singapore, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the court, and he does not within 7 days after service of the notice in case the service is effected in Singapore, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action or proceeding in which the judgment or order was obtained;

To comply with the provision, counsel submits that the bankruptcy notice must follow strictly the terms of the judgment, and this it has failed to do. To make good his argument, counsel takes great pains in examining minutely the material parts of the bankruptcy notice and the judgment and shows that the bankruptcy notice has not followed the terms of the judgment in the following respects:

(i) In the bankruptcy notice the interest for the period from 1 June to 5 July 1988 as demanded is interest at 9.5% pa (ie interest at 3.75% above the petitioners' 'prime rate' of 5.75% pa) with monthly rests 'on the last day of each calendar month from 1 June 1988 to 5 July 1988.' But the terms of the judgment require payment of interest at the 'plaintiffs' prime lending rate on the basis of a 365-day year with monthly rests', which is therefore different from what was stated in the bankruptcy notice.

(ii) For the subsequent period from 6 July to 30 September 1988, the interest demanded in the bankruptcy notice is 'interest at prime of 5.75% pa plus 3.75% with monthly rests as above from 6 July 1988 to 30 September 1988'. This again is different from what was stated in the judgment.

On the basis of these discrepancies between the bankruptcy notice and the judgment, counsel submits that the bankruptcy notice requires payment of interest not in accordance with the judgment and the bankruptcy notice is therefore bad and invalid. I am unable to accept this argument. I accept, and it is not disputed by counsel for the petitioners, that there are these discrepancies, and the bankruptcy notice could have been prepared with more care to conform in every detail to the terms of the judgment. However, in my opinion, these discrepancies are extremely minor and inconsequential, and in all material respects, the bankruptcy notice does conform to the terms of the judgment. The judgment specifically stated the petitioners' prime lending rate as a base for determining the rate of interest payable, and that prime rate (determined by the petitioners) was set out in the bankruptcy notice. The judgment specified 'monthly rests' for the interest, which provided for capitalization of the interest monthly, and since the period for which the interest was chargeable was from 1 June 1988 to the date of the judgment, ie 30 September 1988, which was a period of four complete months, it is convenient and obvious that capitalization should take place at the end of each month — this extra bit was spelt out in the bankruptcy notice but not in the judgment. The rate of interest and the formula for calculation of interest have been clearly set out in the bankruptcy notice, and it cannot be said that because of these discrepancies the bankruptcy notice is calculated to mislead, embarrass or perplex the debtor.

The last ground of objection to the bankruptcy notice is that there were errors in the calculation of interest. First, the interest claimed for the period from 1 June 1988 to 5 July 1988 is excessive: it should be $1,782.95 instead of $1,784.90 as stated in the bankruptcy notice. Secondly, the interest claimed for the period from 6 July 1988 to 30 September 1988 is also wrong: it should be $4,394.02 instead of $3,991.69 as stated in the bankruptcy notice. These errors in the calculation were accepted by counsel for the petitioners who conceded that the computations as furnished by counsel for the debtors are correct. The net result of these errors is that there was an understatement of the interest demanded in the bankruptcy notice. The amount of interest understated for the period from 6 July to 30 September 1988 was $634.31. In consequence of this, the total amount, including the cost of $700, was understated and the daily amount of interest on such total principal was also understated and this in turn resulted in the amount of interest from 1 October 1988 to the date of bankruptcy notice being understated. It is further contended by counsel for the debtors that the interest should be calculated not to the date of the issue of the bankruptcy notice, as stated therein, but to the date of payment, that is, until the judgment is satisfied as provided in O 42 r 12 of the Rules of the Supreme Court 1970. Accordingly, the bankruptcy notice demanded interest to the date of the issue thereof which is less than that which is due. Up to the date of the continued hearing of this petition, the amount under-

demanded by the bankruptcy notice amounted to over $12,000, which, counsel submits, is substantial and significant.

Counsel for the debtors accepts that a sum less than the amount due under a judgment may be claimed in a bankruptcy notice, but in such a case the notice must clearly state that nothing more is claimed to be due on the judgment beyond the amount demanded in the notice. The mainstay of his argument is *Re HB.*[4] In that case, the creditor having been engaged in litigation with the debtor in several actions reached an agreement with the debtor whereby it was agreed that the debt would be a certain sum and the debtor would consent to judgment against him for that sum payable by instalments. Judgment was accordingly entered for the whole of the sum but without any reference to payment by instalments. The debtor failed to pay some of the instalments due, and the creditor served on him a bankruptcy notice requiring payment, not of the whole judgment debt, but of the total amount of instalments then due. It was held that the notice was bad in that it did not require payment of the debt 'in accordance with the terms of the judgment'. What the bankruptcy notice required the debtor to pay was a debt in accordance with the terms not of the judgment, but of an agreement, and on that ground the bankruptcy notice was held to be bad. Vaughan Williams LJ said, at pp 101 to 102:

> The question which we have to decide is whether, at the time when that second bankruptcy notice was issued, it was a notice served on the debtor, within s 4, sub-s 1(g), of the Bankruptcy Act 1883, 'requiring him to pay the judgment debt in accordance with the terms of the judgment'. I do not think it was. I think it was a notice requiring the debtor to pay a debt in accordance with the terms, not of the judgment, but of an agreement; and I think that in dealing with a section of this nature in an Act of Parliament creating a new legislative act of bankruptcy, the actual language of the section ought to be considered.

He later continued, at p 102:

> In the present case the notice which was served on the debtor is a notice which in no way shews that it was for part of the debt; and I say further, that this is a notice which does not seem to me to fall within the spirit of the section at all. What the Act of Parliament seems to me to have intended was that it should be an act of bankruptcy if a debtor did not pay an amount which was adjudged to be due from him; and the question ought to be one turning upon the judgment, and not upon the construction of an agreement which may be more or less complicated, and possibly more or less difficult to construe. Taking the view that I do, I think that this notice does not come within the terms of the section.

But Romer LJ went further. He said at p 103:

> Now I think it is clear that, when you have a judgment in the form that we have here, a bankruptcy notice under the Act must require payment of a sum alleged to be due according to the terms of the judgment — that is to say, it must state the amount that is claimed as remaining unpaid on the judgment debt. Clearly, in a bankruptcy notice the debtor is entitled to see from the notice exactly what is claimed to be due on the judgment debt. No doubt a sum might be claimed which is less than the real amount due, and that would not of course be fatal to the notice so long as the notice made it clear that nothing more was claimed to be due on the judgment beyond the amount specified in the notice. But a notice to pay part of a judgment debt, leaving any balance that may be due to be subsequently claimed is, to my mind, clearly bad.

It is this passage of the judgment of Romer LJ on which counsel for the debtors relies heavily, and he submits that on that basis the bankruptcy notice is bad because:

(i) it does not show on the face of it that what is demanded is only part of the judgment debt and that nothing more is due;
(ii) it purports to say that what is demanded is 'the amount due on the judgment'; and
(iii) in view of these, it is calculated to mislead, embarrass or perplex the debtor.

That case, on a close study of the judgments of the three Lord Justices, does not, in my opinion, really support counsel's argument. The Court of Appeal did not decide that where a bankruptcy notice on the face of it demanded only a part of the judgment debt without stating that it was so and without stating that nothing more was due was bad and invalid. What the court there decided on the facts was that the bankruptcy notice was bad on the ground that it required the debtor 'to pay a debt in accordance with the terms, not of the judgment, but of an agreement' and therefore it did not comply with s 4(1)(g) of the Bankruptcy Act 1883 (which is in pari materia with s 3(1)(i) of our Bankruptcy Act). This is abundantly clear from the judgment of Vaughan LJ, to which I have adverted, and also from the following passage of the judgment of Romer LJ himself at pp 103 to 104:

> Now, the notice in the present case does not allege that the balance of the judgment debt is claimed; and it is clear, on the facts, that what is claimed in the bankruptcy notice is only part of the debt, and that something more is claimed to be due on the judgment debt as a whole. That form of notice clearly could only be justified by the special agreement alleged to exist between the parties. That being so, this notice is not one founded simply on the judgment according to its terms; it is founded on the judgment as modified by the agreement, and it seems to me that the notice is no better than if it had, on the face of it, set forth the facts and required the debtor to pay only part of the judgment debt, according to the terms of the agreement, outside the judgment. To my mind that is not a notice which, within the provisions of the Act, s 4, sub-s 1(g), requires the debtor to pay the judgment debt 'in accordance with the terms of the judgment', and therefore it is, in my opinion, bad. The Act should I think, where it specifies acts of bankruptcy, receive a very careful and strict interpretation.

In the same vein, Stirling LJ said, at p 104:

> In my opinion this appeal fails because at the date when the bankruptcy notice was issued the appellant was not in a

position to require his debtor to pay the judgment debt, in the words of the statute, 'in accordance with the terms of the judgment'. According to the terms of the judgment the debtor was bound to pay at once a sum of £2,700. By a collateral agreement the creditor agreed to accept payment by instalments, and so long as the time fixed for payment of the last instalment had not arrived the creditor could not, consistently with that agreement, enforce payment of the whole judgment debt; that is to say, he could not require payment of the judgment debt 'in accordance with the terms of the judgment'.

...

It appears to me that in reality the creditor is requiring payment of the debt, not simply in accordance with the terms of the judgment, but in accordance with the terms of the judgment as varied by the collateral agreement. I think this is a material departure from the terms of the statute.

The passage of the judgment of Romer LJ relied upon by counsel is, in my opinion, an obiter dictum, and so far as I can see is not supported by any authority.

On the same point, I find helpful two Australian decisions which counsel for the petitioners has brought to my attention. The first is a decision of the Full Court of New South Wales in *Re Farrugia, ex p Deputy Commissioner of Taxation*.[5] There, the bankruptcy notice claimed interest on the judgment debt to a date specified in the notice which was earlier than the date of issue of the notice but did not in terms waive or abandon any claim for interest accruing after the date so specified. It was held that the bankruptcy notice was not defective by reason only of the fact that it claimed part of the interest due and did not in terms waive or abandon any claim for interest accruing after the date specified in the notice. That passage of the judgment of Romer LJ (relied upon by counsel for the debtors) was considered, and the Full Court held that that passage and in particular the last two sentences thereof must be read in the context of the whole of his judgment and what was decided in that case. The Full Court said, at pp 657 to 658:

But if his Lordship meant that a bankruptcy notice must not only make clear what sum is to be paid in compliance with the notice, and that no further payment is required to secure compliance, but must also expressly abandon any future claim (as, for example, by proof of debt in a subsequent bankruptcy) which the terms of the original judgment might enable the creditor to make, we must respectfully disagree. Vaughan Williams and Stirling LJJ laid down no such proposition, and we can see no basis for it in principle.

...

In our opinion the bankruptcy notice before us complies with the statutory requirement of s 41(2), namely, that it requires the debtor to pay the judgment debt in accordance with the judgment. It is true that it does not in terms state that the creditor abandons or waives any claim for interest accruing beyond 26 June 1987, but we see no basis in law for such a requirement.

Even more relevant to the issue before me is the second case, *Kleinwort Benson Australia Ltd* v *Crowl*.[6] In that case, the judgment creditor served on each of the three debtors a bankruptcy notice in which the amount claimed was understated by approximately $23,000, and each debtor challenged the validity of the bankruptcy notice on the ground of the understatement of the amount due. The creditor, however, relied on s 306(1) of the Bankruptcy Act which provides:

Proceedings under this Act are not invalidated by a formal defect or an irregularity unless the court before which the objection on that ground is made is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court.

The High Court said, at pp 165 to 166:

If the amount specified in a bankruptcy notice is in fact due and payment is claimed in accordance with the judgment, the essential requirements of s 41(2)(a)(i) — the only requirements presently relevant — are met. Understatement of the amount due, whether it be an understatement of the judgment debt or of interest payable thereon, will thus constitute a defect which is substantive rather than formal only if the understatement is objectively capable of misleading the debtor as to what is necessary for compliance with the notice.

It may be that, in a given case, understatement is capable of misleading the judgment debtor particulary if the notice is capable of producing uncertainty as to whether the debtor is required to pay the amount in fact due or the amount specified in the notice. In such a case uncertainty arises, not merely from the understatement, but from the understatement in the context of the particular bankruptcy notice. No such uncertainty arises if it is clear that payment of the amount specified in the notice will constitute compliance with the notice.

More specifically the court held that in that case there was no uncertainty as to what constituted compliance with the notice; that the notice could not be regarded as capable of misleading the debtor and accordingly could not be a nullity, and that the understatement was a formal defect and attracted the operation of s 306(1) of the Act.

Counsel for the petitioners relies on these two Australian decisions and submits that the miscalculations of interests and the resulting understatements of the amount in the bankruptcy notice are formal defects or irregularities which in this case do not cause any injustice to the debtors. He accordingly invokes s 133 of the Bankruptcy Act (Cap 20, 1985 Ed), which provides:

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

He also refers to *N Rengasamy Pillai* v *Comptroller of Income Tax*[7] where the bankruptcy notice did not comply with s 7 of the Courts of Judicature Act 1964 of Malaysia in that it was not expressed to be issued by the

Chief Justice of the High Court in the name of Yang di-Pertuan Agong. The question arose as to whether such non-compliance was 'a formal defect or irregularity' within the meaning of s 131 of the Bankruptcy Ordinance 1959 (the equivalent of s 133 of our Bankruptcy Act). The Privy Council held that the non-compliance in that case was merely as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor and was validated by s 131. Lord Diplock, delivering the judgment of the Board said, at p 1135:

> But there is relevant authority upon the construction of the identical words in s 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
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> What, then, is a 'formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re A Debtor (No 21 of 1950), ex p the Debtor* v *Bowmaker Ltd* [1951] Ch 313, in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If, on the other hand, it could not reasonably mislead the debtor it was a formal defect and validated by the section. Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.

I now revert to the facts in this case and consider whether the understatements of the amount of interest were defects which were 'objectively capable of misleading the debtor as to what is necessary for compliance with the [bankruptcy] notice' or 'could reasonably mislead' the debtor. The terms of the bankruptcy notice make it clear what was required to be paid, secured or compounded by the debtor to avoid an act of bankruptcy. There is no uncertainty capable of being produced by the bankruptcy notice as to whether the debtor was required to pay the amount in fact due or the amount specified in the notice so as to avoid an act of bankruptcy. In my judgment, the debtor could not reasonably be misled, embarrassed or perplexed by the amount understated in the bankruptcy notice. Section 133 of the Bankruptcy Act applies and validates the bankruptcy notice.

Counsel for the debtors further relies on *Re A Debtor*,[8] where the bankruptcy notice requiring payment of an amount in excess of that which was due under the final judgment was held to be bad, the excess amount being only £1 5s 6p. Cozens-Hardy MR, in his judgment said, at p 687:

> The amount claimed in the bankruptcy notice was not due. There was a mistake in the calculation of interest. For the present purpose I care not what the precise amount of the mistake was. It was, I believe, between one and two pounds. But putting aside the question of amount, this was a bankruptcy notice which said 'If you do not pay a judgment debt which is due and also a further sum which is not due you are liable to be made bankrupt.' It is said that is a formal defect which can be set right under s 143, sub-s 1, of the Bankruptcy Act 1883, and that we ought to disregard it or treat it as formal and amend the bankruptcy notice and allow the bankruptcy proceedings to go on. On principle, I am not prepared to accede to that argument. I cannot regard it as a mere formal defect that you claim payment from a man of that which never was due from him. It is not necessary to say that there was any attempt on the part of the petitioning creditors wilfully to exact payment of that which they knew was not due. My judgment does not depend upon that. It seems to me that a defect of this kind is substantial, that it is not formal, and does not fall within the language of s 143. So much in point of principle.

That was a case of an over-demand in a bankruptcy notice and the court held that an over-demand was a substantive defect. Arguing by analogy, counsel submits that an under-demand in a bankruptcy notice is equally a substantive defect. In my opinion, that is not so and the analogy is not applicable. Where a creditor makes an over-demand in a bankruptcy notice, he is claiming what is never due to him. In the case of an under-demand or understatement of a judgment debt every cent that is demanded in the bankruptcy notice is due to the creditor, and the only question is whether such under-demand or understatement of the judgment debt is capable of misleading, embarrassing or perplexing the debtor concerned, and if it does not, s 133 of the Bankruptcy Act operates to validate the bankruptcy notice.

In this connection, it is relevant to mention the following. In respect of an over-demand in a bankruptcy notice, s 2 of the English Bankruptcy Act 1914 contained the following proviso:

> Provided that a bankruptcy notice
>
> (i) ...
> (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement; but, if the debtor does not give such notice, he shall be deemed to have complied with the bankruptcy notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein.

This proviso is not present in our Bankruptcy Act. It was first introduced in England in 1913 by the Bankruptcy and Deeds of Arrangement Act 1913 (see s 16(2)(ii)), and it is significant that no amendment, however, was made by that Act or subsequent Act in respect of an understatement of a judgment debt in a bankruptcy notice. One can only conclude that if such understatement was of the same character as an overdemand in a bankruptcy notice, the legislature would have extended the proviso to cover it as well.

In the result, the objections raised on behalf of the debtors to the respective petitions fail. As there is no dispute on the judgment debt which is still unpaid, I propose to make a receiving order and an adjudication order against each of the debtors.

Objections dismissed.

Solicitors: *Tan Rajah & Cheah; Warren Khoo & Co.*

Reported by *Yap Shao Sin*

K-Rex Finance Ltd v Yap Swee Hong & Anor

HIGH COURT (SINGAPORE) — SUIT NO 99 OF 1982
RAJAH J
4 OCTOBER 1990

Banking — Deposit taking — Documentary credits — Guarantees — Plaintiffs not carrying on banking business, unable to sue on banking transaction — Banking Ordinance (Cap 155) [HK], s 5

Contract — Guarantees — Privity

The plaintiffs were a Hong Kong company registered to undertake the business of deposit taking, which was its principal business. On 21 June 1979 the plaintiffs requested the Ka Wah Bank in Hong Kong to issue an irrevocable letter of credit for US$672,500 in favour of one PT Nassalabi. The plaintiffs made this application on the request of Gobee Co, also of Hong Kong. By a guarantee dated 1 June 1979, the defendants, in consideration of the plaintiffs extending credit facilities to the said Gobee Co, jointly and severally agreed to guarantee the due payment of the same. On 27 July 1979 the plaintiffs invoiced Gobee Co for US$739,742.29 being the total amount incurred on the documentary credit transaction. Gobee Co never paid. On 9 June 1980 the defendants entered into a compromise agreement with the plaintiffs to pay the sum of US$739,742.29 by 1 December 1980 if the plaintiffs would discontinue all legal proceedings. The defendants failed to pay. The plaintiffs sued the defendants on the guarantee and the compromise agreement.

Held, dismissing the action:

(1) The plaintiffs, not being party to the letter of credit transaction, could not sue the defendants on the guarantee because the guarantee was in consideration of someone making advances or otherwise extending credit facilities to Gobee Co. The guarantee not covering advances or credit facilities offered by Ka Wah Bank, the defendants were not liable under the guarantee on the letter of credit.

(2) The plaintiffs not being bankers cannot sue on a banking transaction.

(3) There being no liability under the guarantee, the claim under the compromise agreement was misconceived.

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 94 of 1990.]

Legislation referred to
Banking Ordinance (Cap 155) [HK] s 5

Raj Singam (*David Ang* and *Ong Chee Kwan* with him) for the plaintiffs.

Cheong Yuen Hee (*Stephen Loke Chi Teh* with him) for the second defendant.

Cur Adv Vult

Rajah J: The plaintiff is a company incorporated and registered on 17 March 1978 under the laws of Hong Kong and having its registered offices at 21F, Ka Wah Bank Centre, 224-234-A Des Woeux Road Central, Hong Kong. In June 1978 the plaintiff was registered in Hong Kong under the Deposit Taking Companies Ordinance as a deposit taking company. The principal business of the plaintiff was that of a deposit-taking company. The company applied for a moneylenders licence and was granted such a licence on or about 20 June 1978 for one year. The licence lapsed on 21 June 1979 and remained lapsed until 2 November 1979. The licence was renewed again from 3 November 1979 to 2 November 1980 and again from 3 November 1980 to 2 November 1981 (DB2). From the above it is clear that the plaintiff was not a licensed moneylender for the period 21 June to 2 November (both dates inclusive) 1979.

The plaintiffs by para 2 of this statement of claim plead that:

(1) by terms of a continuing guarantee in writing dated 1 June 1979 in consideration of the plaintiffs' making advances or otherwise extending credit facilities to one Gobee Co Ltd, of 402, General Commercial Building, 154-164 Des Voeux Road Central, Hong Kong, the defendants together with one Vincent Yoong Tat Kwong (since deceased) jointly and severally agreed with the plaintiffs to guarantee the due payment of the same;

(2) on 21 June 1979, the Ka Wah Bank Ltd in Hong Kong, on the application of the plaintiffs who in turn had been requested by the said Gobee Co, duly issued an irrevocable letter of credit for US$672,500 in favour of one PT Nassalabi Co of Kalimantan, Indonesia to pay for timber ordered by one Cheung Hsia Trading Co Ltd, of 311-2 Third Floor, Jin Jin Building, 242 Liu Shen First Road, Kaonn Yisung, Taiwan. Subsequently, one Winsome Taiwan Enterprises Corp of the same address was substituted for the said Cheng Hsia Trading Co;